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No. 80-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MALLEABLE IRON RANGE COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON BEHALF OF OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Office and Professional Employees International Union, AFL-CIO, CLC, is an international labor organization representing white collar and other employees engaged in office, clerical, professional, semi-professional, technical, and administrative work. Collective bargaining agreements covering the wages, hours, and working conditions of these employees are negotiated and consummated in most, but not all, situations by local unions chartered by the International

Union. OPEIU Local 39, the petitioner before the National Labor Relations Board in Case No. 30-CA-5206, and the charging party that initiated the proceeding in *Malleable Iron Range Company*, is one of these local unions, and is most directly affected by the instant proceeding. The International Union is vitally concerned with the issues in this case as it affects its entire membership, from the kind of secretary involved in *Hendricks County Rural Electric Membership Corporation* to all employees who do work which may be considered by their employers as confidential.

Consent to the filing of this brief amicus curiae has been obtained from the other parties involved, and such written consents are on file in the Clerk's office.

The Office and Professional Employees International Union has filed this brief *amicus curiae* in support of the petition for writ of certiorari filed by the National Labor Relations Board, and hereby urges that such petition be granted.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The Issues in This Case Are of Fundamental Public Importance to Employers and to All Employees in the United States Who May Do Work Considered by their Employers to Be Confidential

Employees in white collar job occupations or employees whose work is identified as office, clerical, professional, semi-professional, technical, and administrative make up a substantial and important segment of the American work force. It is well known that employees in these fields of work are increasing in

number as compared to the number of employees engaged in other endeavors, and their numbers are expected to comprise an increasingly important portion of the work force in the future.

In addition to the Office and Professional Employees International Union, AFL-CIO, whose primary work jurisdiction deals with office, clerical, professional, semi-professional, technical, and administrative employees, it is well known that many other labor organizations also represent substantial membership in these occupational areas.

Representation of employees in these occupational areas by the Office and Professional Employees International Union and its local unions has been achieved primarily through proceedings brought before the National Labor Relations Board under the labor statute. The instant case involving Malleable Iron Range Company and OPEIU Local 39 is a typical example. The Board's prior legal standard on what constitutes a confidential employee has been utilized as an organizational and collective bargaining guideline throughout the history of the OPEIU from its initial chartering in 1945 to the present time. Furthermore, this Board standard, framed as it has been within its labor relations nexus, has been well understood by employers, labor organizations, and employees until the decisions in the court below.

The decisions below, if allowed to stand, are likely to bring industrial relations chaos to an area that has been stable and successful until the present time. They will seriously interfere with the national labor policy of industrial peace.

This is so because almost all office, clerical, professional, semi-professional, technical, and administrative employees, in some degree or another, work with, or have access to, information that their employers would likely consider as confidential, in that its contents would not be made available to the general public, to competitors, to regulatory agencies where applicable, and to those persons not specifically authorized to receive such information. Examples of the disruption that is likely to occur if the decisions of the Court of Appeals below are allowed to stand are shown in the attached affidavit and exhibits.

1. The collective bargaining agreement between the Admiral Corporation, Galesburg, Ill., and OPEIU Local 444 contains the job classification of secretary, a job that was involved in Hendricks County Rural Electric Membership Corporation. Under the ruling below, secretaries in most instances would no longer be entitled to representation by unions under the Act and to be protected by collective bargaining agreements.

2. The collective bargaining agreement between General Dynamics Corporation, Fort Worth, Tex., and OPEIU Local 278 provides in Art. I, Sec. 2 thereof for the coverage of employees as previously certified by the National Labor Relations Board, except for "confidential employees who customarily assist management representatives in the handling of labor relations matters." This is accordance with the legal standard adopted by the NLRB.

3. The collective bargaining agreement between Consolidated Freightways, Portland, Ore., and OPEIU Local 11 provides for a contractual exception for "those employees in positions which are exempt or which will become exempt under any Federal statute, or the inter-

pretation thereof by a court or agency of competent jurisdiction." The ruling below, if allowed to stand, would likely disrupt this established contractual relationship.

4. The collective bargaining agreement between Group Health Association, Washington, D.C., and OPEIU Local 2, involves employees employed by a health care institution. One can hardly imagine any record more confidential than that of medical patients. One does not have to engage in supposition to understand that unionized employees of Group Health Association deal with the medical records of patients each and every day as a part of their ordinary work activity. The broad interpretation of "confidential" by the Court of Appeals below might well destroy collective bargaining in the health care industry only a short time after Congress wrote specific provisions into the Act to extend its coverage to health care institutions.

Both the public importance and the drastic consequences of the decisions below were recognized by Judge Cudahy in his dissenting opinions below. In *Hendricks County* (App. 12a), he wrote:

> To paint with a broad brush about the purported exclusion of "confidential" employees (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most* (emphasis by Judge Cudahy), white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, costs, of designs, of customer

lists, of prices, of medical records — the list is endless.

In *Malleable Iron Range*, Judge Cudahy said (App. 60a):

> I fear that the application of the majority's new test for excluded "confidential employees" may demonstrate both its lopsidedness in principle and its potentially sweeping impact on the statutory protection, particularly of white collar workers. See *Union Oil Company of California* v. *NLRB*, 607 F. 2d 852, 853 (9th Cir., 1979).

The Labor Board itself, in an opinion released after the Seventh Circuit rulings in these cases, has just completed a review of the confidential issue and has reiterated the sweeping public importance of this matter. *Kleinberg, Kaplan, Wolff, Cohen, & Burroughs, P.C.*, 253 NLRB No. 54, 105 LRRM 1611 (Nov. 21. 1980). Not only does its thorough review of the legislative history of the 1947 amendments to the statute establish that it was never the intention of Congress to exclude from coverage of the Act the type of confidentials found by the Court below, but it pointed out that such a result would be so "revolutionary" that Congress could not have intended it.

At 105 LRRM 1611, 1617, it said:

> Clearly, such a definition would vitiate collective organization by large numbers of both white- and blue-collar employees already organized, since many, in the normal course of their duties, have access to such information. Moreover, the future impact of this broader standard would be incalculable. The Bureau of Labor Statistics has projected that, by 1990, the economy will have created nearly 20 million new jobs, well over half of which will be in white-collar occupations. In the white-collar

category, clerical employees, which includes bank tellers, bookkeepers, cashiers, secretaries, and typists, are the fastest growing group. U. S. Department of Labor Statistics, News Bulletin 79 - 903 (December 27, 1979). Many of these new workers would have access to confidential information in the broader sense. As a consequence in future years a rapidly growing percentage of workers in the work force would be deprived of rights under the Act. If Congress intended such a result so revolutionary, we believe that it would have said so expressly, Cf. *Bell Aerospace*, 416 U.S. at 284-285, fn. 13.

While alarm at the vast scope of the potential consequences of decisions below may induce toward hyperbole, it may be safely said that it would be difficult indeed to conceive of any appellate court labor ruling in the past quarter century that has such public importance, simply because these decisions can affect so many, can deprive so many, can deny so many in the future, and can obliterate so many past established collective bargaining relationships.

2. The Decisions Below Conflict With Other Courts of Appeals Decisions, Particularly With the More Recent Ninth Circuit Ruling Approving the Board's Standard

While the petition filed on behalf of the NLRB does set forth a conflict in decisions betweeen courts of appeals, particular note should be taken of the holding of the Ninth Circuit in *Union Oil Company of California* v. *NLRB*, 607 F. 2d 852 (9th Cir., 1979), referred to also in the dissenting opinion of Judge Cudahy in *Hendricks County* below.

The clear conflict between circuits is another reason why the writ should be granted in this case.

3. Fundamental Confusion from this Court's Holding in Bell Aerospace Requires Clarification and Distinction in these Proceedings

It is apparent from reading the opinions of the Court below that it has either seriously misperceived the thrust of this Court's holding in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), or else the National Labor Relations Board, Judge Cudahy, and the Ninth Circuit have seriously misperceived it. Even while the petition in this case is pending, the OPEIU, as a labor organization vitally concerned, waits with apprehension for another shoe to drop when some other appellate court may extend the holding of *Bell Aerospace*, or misapply it, or glean some new interpretation of it, as the court below has apparently done.

One may readily argue that this Court never intended to hand down legal guidelines beyond those applying to managerials. But judges of the Court of Appeals for the Seventh Circuit have construed *Bell Aerospace* otherwise. Only a definitive ruling by this Court can provide correct guidance for the future.

The writ should be granted.

Respectfully submitted,

JOSEPH E. FINLEY
57 Brookstone Drive
Princeton, N. J. 08540

Attorney for Office and Professional Employees International Union, AFL-CIO CLC

EXHIBITS

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

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v.

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NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

MALLEABLE IRON RANGE COMPANY

STATE OF NEW JERSEY
COUNTY OF MERCER

AFFIDAVIT OF JOSEPH E. FINLEY

JOSEPH E. FINLEY, being first duly sworn, deposes and says:

1. I am a member of the bar of this Court and have been so continuously since 1954.

2. I am general counsel for the Office and Professional Employees International Union, AFL-CIO, CLC, and have been so continuously since 1955. As general counsel, I am familiar with all of the legal work involving the International Union and am especially familiar with many of the collective bargaining contracts entered into between employers and local unions of the International Union. Many of these agreements are kept in my files in the regular course of business of representing both the International Union and many of its local unions.

3. The Office and Professional Employees International Union, hereinafter referred to as the OPEIU, which was initially chartered in 1945 by the American Federation of Labor, has grown continuously in size until in 1981, it has approximately 120,000 members and ranks in membership

size among the top one-third of all international unions affiliated with the AFL-CIO. It believes it is the major labor organization in the United States engaged in the representation of office, clerical, professional, semi-professional, technical, and administrative employees.

4. Attached to this affidavid as exhibits are portions of collective bargaining contracts entered into between local unions of the OPEIU and employers in various parts of the United States. These agreements were either contained in my own business files or were supplied to me through the OPEIU.

5. I am personally familiar, through my more than a quarter century of representing the OPEIU, with the composition and scope of most of the collective bargaining units represented by local unions of the OPEIU and with the kind of work performed by employees in these units. Almost all of the office, clerical, professional, semi-professional, technical, and administrative work performed by these employees, in one degree or another, involves access to information that employers would not want made available to the public in general, to competitors, to regulatory agencies, where pertinent, and to unauthorized persons.

/s/ JOSEPH E. FINLEY

Subscribed and sworn to before me this 12th day of January 1981

/s/ MARIE G. BAHR

Notary Public
Marie G. Bahr
Notary Public of New Jersey
My Commission Expires
June 14, 1982

Exhibit A to
Affidavit of Joseph E. Finley

This is the cover page and one page taken from a collective bargaining contract between Admiral Corporation and Office and Professional Employees International Union, Local 444, in Galesburg, Ill. In Labor Grade 3, there is contained the job classification of Secretary. Others listed are illustrative of some of the other jobs.

1976 - 1979

AGREEMENT

Between

Admiral
Corporation

AND

Office and Professional
Employees International
Union
AFL-CIO
Local 444

GALESBURG, ILLINOIS

APPENDIX D

OFFICE JOB CLASSIFICATIONS

GRADE 1:
Clerk Typist

GRADE 2:
**Draftsman Trainee
Keypunch Operator
Personnel Clerk
Print Room Operator
Secretary-Stenographer
Specifications Technician Jr.
Switchboard Operator
Traffic-Clerk Typist

GRADE 3:
Billing Clerk
Bill of Material Coordinator
Clerk-Non Pro Stores
Expeditor Internal
General Lab Helper
Insurance Clerk
Multilith Operator
Secretary
Senior Clerk
Telecontrol Operator
Senior Personnel Clerk
Accounts Payable Expeditor
Order Clerk
Warehouse Clerk

GRADE 4:
Material Coordinator
Offline Equipment Operator
Payroll Clerk
Schedule Clerk
Service Department Clerk
Specification Clerk
Test Calculator
Traffic Clerk

Exhibit B to
Affidavit of Joseph E. Finley

This is the inside cover page and the first page of an agreement between General Dynamics Corporation, Fort Worth, Texas, and Office and Professional Employees International Union Local 277. The underlining is by affiant.

AGREEMENT

BETWEEN

GENERAL DYNAMICS CORPORATION
FORT WORTH DIVISION

AND

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL NO. 277
AFL-CIO



EFFECTIVE
30 OCTOBER 1978

PREAMBLE

The purpose of this Agreement is to establish harmonious relations between the parties and to facilitate orderly adjustment of grievances, complaints, and disputes which may arise from time to time between the Company and the Union. This Agreement is entered into in consideration of the mutual performance thereof in good faith by the parties.

This Agreement made and entered into this 30th day of October 1978 by and between GENERAL DYNAMICS CORPORATION, Fort Worth Division, hereinafter called the "Company" and the OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 277, AFL-CIO, hereinafter called the "Union."

ARTICLE I

RECOGNITION

Section 1. The Company recognizes the Union as the exclusive collective bargaining representative of all employes in the "office and clerical" unit as agreed to in the Consent Election Agreement entered into by the parties June 1, 1951, in the National Labor Relations Board Case No. 16-RC-731, and all employes in the "photography" unit as agreed to in the Consent Election Agreement entered into by the parties May 5, 1966, in the National Labor Relations Board Case No. 16-RC-4278.

Section 2. For purposes of this Agreement, the terms "employe" and "employes" shall include, but without limitation thereby, all persons in the employ of the Company classified on job classifications listed in Appendix "A" attached hereto, except for confidential employes who customarily assist management representatives in the handling of labor relations matters.

ARTICLE II

UNION SECURITY

Section 1. Membership in the Union is not compulsory. Employes have the right to join, not join, maintain, or drop their membership in the Union as they see fit. Neither party shall exert any pressure on or discriminate against an employe as regards such matters.

Exhibit C to
Affidavit of Joseph E. Finley (first page)

This is the cover page of the agreement between Consolidated Freightways Corporation, Portland, Oregon, and Office and Professional Employees International Union Local 11, Portland, Ore.

WORKING AGREEMENT

BETWEEN

AND

OFFICE & PROFESSIONAL

EMPLOYEES UNION

LOCAL No. 11

FOR THE PERIOD OF

OCTOBER 1, 1979 thru SEPTEMBER 30, 1982

Exhibit C to
Affidavit of Joseph E. Finley (page 2)

This is the first page of the collective bargaining agreement between Consolidated Freightways, Portland, Ore., and OPEIU Local 11. The underlining is by affiant.

AGREEMENT

THIS AGREEMENT, made and entered into this first day of October, 1979 by and between CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, for itself, their successors and assigns, where the Union has been certified as the collective bargaining agent in the states of Oregon and Montana, and in Longview, Washington, hereinafter referred to as "Employer," and the OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 11, a local union chartered by the Office & Professional Employees International Union, AFL-CIO, hereinafter referred to as the "OPEIU" or as the "Union."

1.0
RECOGNITION

Application of Agreement

1.1 The Employer agrees to recognize the Union as the sole collective bargaining agent for the bargaining unit composed of all office and clerical employees employed by the Employer within the states of Oregon and Montana, and at the Employer's terminal in Longview, Washington, with the exception of those employees in positions which are exempt or which will become exempt under any Federal statute, or the interpretation thereof by a court or agency of competent jurisdiction. The Company and the Union may, during the life of this Agreement, mutually agree to exclude from the bargaining unit other positions and/or employees who are not exempt or excluded, or may include in said bargaining unit positions and/or employees which have heretofore been excluded.

Change of Status

1.2 The provisions of this Agreement shall be binding upon the Union and the Company, and all the terms and obligations herein contained shall not be affected or changed in any respect by the consolidation, merger, sale, transfer, assignment, or by any change in the legal status, ownership, corporate structure, or management of the Company.

Additional Locations

1.3 In the event the Employer opens a new office facility employing office or clerical employees (other than exempt employees) in Oregon, Montana, or Longview, Washington, the Union shall be so notified and if the employees at such new facility certify the Union as the exclusive collective bargaining representative as a result of Employer recognition of a majority of authorization cards, the Employer and the Union shall thereafter enter into negotiations concerning wages, hours, and working conditions at such newly opened office facility.

Exhibit D to
Affidavit of Joseph E. Finley

This is a copy of the cover page and the first page of an agreement between Group Health Association of Washington, D.C., and Office and Professional Employees International Union Local 2, of Washington, D.C. Group Health Association is a health care agency providing medical services to members in the District of Columbia, Maryland, and Virginia.

COLLECTIVE BARGAINING AGREEMENT

by and between

GROUP HEALTH ASSOCIATION, INCORPORATED

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2

Term of Agreement

November 1, 1978

to

October 31, 1980

A G R E E M E N T

THIS AGREEMENT, made as of _____, 1978 by and between GROUP HEALTH ASSOCIATION, INC. (hereinafter called "GHA") and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 2 (hereinafter called "the Union").

W I T N E S S E T H:

The parties recognize Group Health Association's special s atus as a health care institution. Each bargaining unit member shall use his best efforts and skills to furnish in the best manner practicable the highest quality of health care services required to be rendered to GHA members.

ARTICLE 1

RECOGNITION AND CHECKOFF

§1.1 RECOGNITION: Pursuant to a certification by the National Labor Relations Board in Case No. 5-RC-7219, GHA recognizes the Union as the sole and exclusive bargaining agent with respect to rates of pay, hours of work and other conditions of employment for the following unit of its employees:

> All office and technical employees employed by GHA, excluding all maintenance employees, casual employees, regular part-time employees working less than twenty (20) hours a week, confidential employees, professional employees,